# Nutri Mills Products Sdn Bhd v CMA CGM Malaysia Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 27–19–05 OF 2012
NALLINI PATHMANATHAN J
9 NOVEMBER 2012

*Civil Procedure — Stay of proceedings — Foreign jurisdiction clause — Plaintiff sued ship owner and agent for breaching contract for shipment of goods — Forum selection clause in bills of lading required claim against ship owner to be determined in France — Whether prima facie case lay for action filed in Malaysia to be stayed — Whether plaintiff could sue principal and agent at same time in one action*

The first defendant ('D1') was the agent of the second defendant ('D2'), a French company, who were carriers of goods by sea. The plaintiff contracted with D1 to send three shipments of goods by sea to Gambia in West Africa. The bills of lading in respect of the shipments were issued in Kuala Lumpur and signed by D1 as agent for D2. The contracts of sale of the goods were on 'cash against documents' basis. The receiver of the goods in Gambia, however, failed to make payment for the cargo upon delivery. While the plaintiff was deciding whether to ship the cargo back to Malaysia or to find other buyers for it, it was informed by the defendants that the cargo was released to the receiver against the receiver's letter of indemnity. This was done without the plaintiff's knowledge or agreement. The usual shipping practice of delivering cargo against the surrender of the original bills of lading had not been followed and the plaintiff maintained that this constituted a breach of the contract of carriage of the goods. Owing to that breach, the plaintiff claimed in the instant suit for loss and damage against the defendants. The defendants responded by filing (i) an application to set aside the writ and its service pursuant to the former O 12 r 7 of the Rules of the High Court 1980 ('RHC') on the ground the bills of lading expressly stated that any dispute or claim against D2 shall be brought and determined in France and (ii) an application to strike out the action under O 18 r 19(1)(b) and (d) of the RHC on the basis the plaintiff could not legally sue both agent and principal at the same time.

**Held**, dismissing the defendants' applications:

(1) Where there was a forum selection clause, that itself did not oust the court's jurisdiction. The court's jurisdiction existed subject to its power to stay the matter to give effect to the forum selection clause. It was a matter of discretion for the court to determine whether or not to allow the

matter to be litigated locally. The onus was on the plaintiff to show a strong case that effect ought not to be given to the forum selection clause (see para 26).

(2) The evidence on the issues of fact in the instant case was largely situated or more readily available in Malaysia (or Gambia) rather than in France. There appeared to be no nexus between the current dispute and France save for the fact D2 was a French company. As such, the relative convenience and expense of trial as between Malaysia and France weighed in favour of Malaysia on the present factual matrix and served as a strong factor to rebut the prima facie case in favour of a stay (see paras 31–32 & 33(c)).

(3) The plaintiff was entitled to commence its action against both the agent and the principal and make the requisite election if necessary during or at the close of the trial. At the inception of the case the plaintiff would not be in a position to determine conclusively whether to proceed against the one or the other as all relevant facts might not be within its knowledge and would unfold during the course of the trial. It was untenable to contend the plaintiff's claim ought to be struck out for being abusive or scandalous simply because it had sued both the agent and the principal (see paras 40 & 42).

**[Bahasa Malaysia summary**

Defendan pertama ('D1') merupakan ejen kepada defendan kedua ('D2'), sebuah syarikat Perancis, yang merupakan pembawa barang-barang melalui laut. Plaintif telah memasuki kontrak dengan D1 untuk menghantar tiga penghantaran barang-barang melalui laut ke Gambia di Afrika Barat. Bil-bil muatan bagi penghantaran telah dikeluarkan di Kuala Lumpur dan ditandatangani oleh D1 sebagai ejen kepada D2. Kontrak-kontrak jualan barang-barang berasaskan 'tunai bagi dokumen-dokumen'. Walau bagaimanapun, penerima bagi barang-barang di Gambia gagal untuk membuat pembayaran untuk kargo selepas penghantaran dibuat. Sementara plaintif memutuskan sama ada kapal kargo wajar dihantar semula ke Malaysia atau untuk mencari pembeli-pembeli lain untuknya, defendan-defendan memaklumkan bahawa kargo telah dilepaskan kepada penerima, bertentangan dengan surat tanggung rugi. Ini telah dilakukan tanpa pengetahuan atau persetujuan plaintif. Amalan biasa perkapalan dalam menghantar kargo bagi penyerahan semula bil-bil muatan asal tidak dipatuhi dan plaintif menegaskan bahawa ini merupakan pelanggaran kontrak pengangkutan barang-barang. Berdasarkan pelanggaran tersebut, plaintif dalam guaman ini menuntut bagi kerugian dan kerosakan daripada defendan-defendan. Defendan-defendan membalas dengan memfailkan (i) suatu permohonan untuk mengetepikan writ dan penyampaiannya di bawah A 12 k 7 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan bahawa bil-bil muatan menyatakan secara tersurat bahawa mana-mana pertikaian atau tuntutan terhadap D2 hendaklah

dibuat dan diputuskan di Perancis; dan (ii) suatu permohonan untuk membatalkan tindakan di bawah A 18 k 19(1)(b) dan (d) KMT atas alasan bahawa plaintif tidak boleh secara sah menyaman kedua-dua ejen dan prinsipal serentak.

**Diputuskan**, menolak permohonan defendan-defendan:

(1) Jika terdapat klausa pemilihan forum, ianya dengan sendiri tidak akan mengetepikan bidang kuasa mahkamah. Bidang kuasa mahkamah tertakluk kepada kuasa bagi penangguhan hal perkara tersebut untuk menguatkuasakan fasal pemilihan forumnya. Ia adalah suatu perkara budi bicara mahkamah untuk menentukan sama ada untuk membenarkan atau tidak perkara tersebut dilitigasikan dalam negara. Beban adalah di atas plaintif untuk membuktikan kes yang kukuh bahawa kesan tersebut tidak sepatutnya diberikan kepada fasal pemilihan forum (lihat perenggan 26).

(2) Bukti-bukti berdasarkan isu-isu fakta di dalam kes ini sebahagian besarnya terletak atau lebih mudah didapati di Malaysia (atau Gambia) daripada di Perancis. Kelihatan bahawa tiada pertalian antara pertikaian ini dan Perancis kecuali fakta bahawa D2 adalah sebuah syarikat Perancis. Dengan itu, kemudahan relatif dan perbelanjaan perbicaraan antara Malaysia dan Perancis dipertimbangkan memihak kepada Malaysia pada matriks fakta ini dan berfungsi sebagai faktor yang kuat untuk menangkis kes prima facie dalam memihak kepada penangguhan (lihat perenggan 31–32 & 33(c)).

(3) Plaintif berhak memulakan tindakannya terhadap kedua-dua ejen dan prinsipal dan membuat pemilihan yang dikehendaki jika perlu semasa atau pada penutup perbicaraan. Pada permulaan kes, plaintif tidak akan berada dalam kedudukan untuk menentukan secara konklusif sama ada untuk meneruskannya terhadap pihak tersebut atau lain-lain kerana kesemua fakta-fakta berkaitan tidak mungkin berada dalam lingkungan pengetahuannya dan akan terungkap semasa perbicaraan. Hujahan bahawa tuntutan plaintif harus dibatalkan adalah tidak dapat dikekalkan kerana bersifat penyalahgunaan atau skandal semata-mata kerana ia telah menyaman kedua-dua ejen dan prinsipal (lihat perenggan 40 & 42).]

**Notes**

For a case on foreign jurisdiction clause, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) para 7846.

**Cases referred to**

*Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong* [1995] 1 MLJ 322, CA (refd)

*JH Rayner (Mincing Lane) Ltd & Ors v Manilal & Sons (M) Sdn Bhd & Anor* [1987] 1 MLJ 312 (refd)
*Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, FC (refd)
*Lung Yung The 'Lung Yung' & 'Thai Yung' Owners & Ors, The v Sadit Timbers Sdn Bhd & Ors* [1984] 1 MLJ 29, FC (refd)
*Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v The Eleftheria (owners), The Eleftheria* [1969] 2 All ER 641 (folld)
*Taipan Focus Sdn Bhd v Tunku Mudzaffar b Tunku Mustapha* [2011] 1 MLJ 441, FC (refd)
*'The Vishva Apurva'; Owners of and Other Persons Interested in the Ship or Vessel 'Kalidas' v Owners of Cargo Lately Laden on Board the Ship or Vessel 'Vishva Apurva'* [1992] 2 SLR 175, HC (refd)
*Wong Peng Yan Benjamin v Genting Bhd & Anor* [1993] 3 MLJ 713; [1994] 1 CLJ 35, HC (distd)

**Legislation referred to**

Contracts Act 1950 s 186
Rules of Court 2012
Rules of the High Court 1980 O 12 rr 7, 10, O 18 r 19(1)(b), (d)

*Arun Krishnalingam (Sativale Mathew Arun) for the plaintiff.*
*G Rajasingam (Sharul Hadzly with him) (Shearn Delamore & Co) for the defendants.*

**Nallini Pathmanathan J:**

INTRODUCTION

**[1]** The plaintiff's claim against the first and second defendants here is for loss and damage in the sum of USD204,319.11 for breach by the defendants of various contracts of carriage as contained or evidenced by several bills of lading. The first defendant ('D1') is and was at all material times the agent of the second defendant ('D2'). The second defendant which is a French company operated at all material times as carriers by sea of goods.

**[2]** In response to this claim the first and second defendants have each filed applications to set aside the writ of summons in admiralty in personam and the statement of claim dated 14 May 2012 under the previous O 12 r 7 of the Rules of High Court 1980 on the grounds that there exists a forum selection clause. Additionally the defendants seek to strike out the plaintiff's claim under O 18 r 19 on grounds (b) and (d) (namely that the claim is scandalous, frivolous and vexatious) coupled with the inherent jurisdiction of the court on the premise that the plaintiff cannot in law proceed against both defendants as they are

agent and principal. It is contended that the plaintiff is bound, under the law, to elect to proceed against either the principal or the agent.

**[3]** Both defendants' applications will be considered together, first in relation to the issue of jurisdiction and secondly in relation to the striking out.

SALIENT BACKGROUND FACTS

**[4]** The salient background facts are comprehensively set out in the statement of claim as well as the submissions of learned counsel for the plaintiff and the defendants and I adopt the same summarisation below.

**[5]** The plaintiff, through their agent, one Eminence Worldwide Sdn Bhd, through a booking made with D1 entered into a contract to ship 2 x 20 ST containers of RBD Palm Olein in cans from Port Klang to Banjul, Gambia. Having paid the charges invoiced by D1 for their services, the containers of Palm Olein were loaded on board the vessel CMA CBM VELA whereupon three original bills of lading No MY2261394 dated 26 September 2011 were issued in Kuala Lumpur and signed by D1 as agents for D2 as the carrier. This is evidenced by the booking note, invoices and the bill of lading issued by D1 on behalf of D2.

**[6]** Subsequently the plaintiff through its agent, one Alim Maritime Agencies Sdn Bhd through a booking made with D1, entered into a contract to ship another 2 x 20 ST containers of RBD Palm Olein in cans from Port Klang to Banjul, Gambia. In consideration of the charges as invoiced by D1 and duly paid, the containers were loaded on board the vessel CMA CGM HYDRA and three original bills of lading No MY 2261056 dated 31 August 2011 were issued in Kuala Lumpur and signed by D1 as agents for D2 as carrier.

**[7]** In the third transaction, the plaintiff through their agent Alim Maritime Agencies Sdn Bhd through a booking made with D1, entered into a contract to ship 2 x 20 ST containers of RBD Palm Olein in cans from Port Klang to Banjul, Gambia. Having duly paid D1 the charges invoiced, the containers were loaded on board the vessel CMB CGM THALASSA and three original bills of lading No MY 2260331 dated 26 July 2011 were issued in Kuala Lumpur and signed by D1 as agents for D2.

**[8]** These three shipments above were shipped to Banjul Gambia pursuant to contracts of sale on a 'cash against documents' basis with a company called IJ General Merchandise of Banjul, Gambia in West Africa ('the receiver') who was also listed as the 'Notify Party' to all the three bills of lading.

**[9]** The receiver failed to make payment for the said cargo in Banjul whereupon the plaintiff commenced preparations to ship the cargo back to Malaysia or to re-sell the cargo to other buyers. However the plaintiff contends that the defendants through an email dated 14 February 2012 informed the plaintiff that the cargo carried under the three bills of lading were released to the receiver against the receiver's letter of indemnity without the agreement or knowledge of the plaintiff. In other words, the usual shipping practice of delivering against the original bills of ladings only was not followed.

**[10]** The plaintiff therefore complains that where a shipowner delivers the cargo without obtaining first obtaining the surrender of the bill of lading, this amounts, inter alia, to a breach of the contract as contained in the bill of lading, (see *The Lung Yung The 'Lung Yung' & 'Thai Yung' Owners & Ors v Sadit Timbers Sdn Bhd & Ors* [1984] 1 MLJ 29).

## THE DEFENDANTS' APPLICATIONS UNDER O 12 R 7 OF THE RHC 1980

**[11]** As this application was filed prior to the coming into force of the Rules of Court 2012, it is in order for these applications to be disposed under the previous O 12 r 7, which now no longer subsists and has been replaced in respect of disputes pertaining to jurisdiction by O 12 r 10.

**[12]** The defendants' application under this head rests primarily on an express term in the bills of lading which provides that any dispute or claim against D2, as the carrier shall be brought and determined in France by the 'Tribunal de Commerce du Havre'. There is in other words an express clause specifying the jurisdiction in which disputes are to be heard, by consent of the parties. The precise term reads as follows:

> LAW AND JURISDICTION: *Any claim or dispute against the Carrier arising under this Bill of Lading*, including third party proceedings or those involving several defendants, shall be governed, for the maritime part of the carriage, either by the International Convention for the unification of certain rules relating to Bills of Lading dated Brussels, the 25th August 1924 as enacted in the country where the Bill of Lading is issued or, when the Convention is not compulsorily applicable, by the said Convention non amended and, for the non maritime part of the carriage, either by the provisions contained in any international Convention or National Law compulsorily applicable, or by French Law applicable to the means of transport utilised and *shall be determined in France by the Tribunal de Commerce de Havre*.

**[13]** The foregoing serves as a forum selection clause. The defendants contend that by virtue of its subsistence in the bill of lading which incorporates the express agreement between the parties, the parties had agreed that all disputes arising from the bill of lading would be determined in France by the

Tribunal de Commerce de Havre. As such, it is contended that the plaintiff's claim in the High Court in Malaya is flawed, as it ought to have been commenced as agreed between the parties. In this context the defendants point out that the plaintiff and D2 agreed that in accepting the bills of lading the plaintiff accepted and agreed to be bound by all of its terms and conditions including those on the reverse of the bills of lading.

**[14]** The reverse side provides that the 'Merchant' namely the shipper here, ie the plaintiff expressly accepts and agrees to be bound by all the terms, conditions and exceptions on the bill of lading albeit printed, stamped or written or otherwise incorporated notwithstanding that the bill of lading was not signed by the 'Merchant'.

**[15]** As such the defendants maintain that it was an agreed term of the contract between the plaintiff and D2 that any claim or dispute against D2 as the carrier would be determined in France by the Tribunal de Commerce de Havre.

THE LAW

**[16]** Both learned counsel for the plaintiff and the defendants concurred that the position in law in relation to the issue relating to the forum selection clause is set out in the English case of *'The Eleftheria'* [1969] 2 All ER 641 by Brandon J. In that case the court had before it an application by ship owners to stay an action brought against them by cargo owners on the grounds that the contracts of carriage sued on contain a Greek jurisdiction clause and are governed by Greek law. The clause there provided that any dispute arising under that bill of lading 'shall be decided in the country where the Carrier has his principal place of business and the law of such country shall apply except as provided elsewhere herein.'

**[17]** The uncontradicted evidence in that case was that the defendants had their place of business in Athens and the dispute was premised on the bills of lading. As such under the clause the parties had agreed to refer it to a Greek court. Brandon J then went on to consider the principles of law to be applied when considering an application to stay an action on the ground of the subsistence of such an agreement as above.

**[18]** In the instant case precisely the same issue arises and therefore the principles set out in '*The Eleftheria*' are wholly applicable here. The principles as established by a series of authorities reviewed and considered by Brandon J were summarised as follows in the judgment:

> … The principles established by the authorities can, I think be summarised as follows:- (1)Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (II) the discretion should be exercised by granting a stay unless a strong cause for not doing so is shown. (III) The burden of proving such strong cause is on the plaintiffs. (IV) In exercising its discretion, the court should take into account all the circumstances of the particular case. (V) In particular, but without prejudice to (IV), the following matters where they arise may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; (d) whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial …

**[19]** It is clear from the foregoing that in determining whether the action ought to be set aside or stayed by reason of the French jurisdiction clause, it is essential for this court to give full weight to the prima facie desirability of holding the parties to their agreement as contained in the bill of lading. I am cognisant of the fact that as stated by Brandon J this court must be careful '… not just to pay lip service to the principle involved, and then fail to give effect to it because of a mere balance of convenience'.

**[20]** The onus therefore falls upon the plaintiff to establish a strong case showing why the matter ought not to be determined by the Tribunal de Commerce de Havre. This is achieved by considering and weighing the factors tending to rebut the prima facie case for a setting aside or a stay.

**[21]** The Court of Appeal adopted and approved the foregoing approach in *Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong* [1995] 1 MLJ 322. In that case reliance was placed on a clause in the bill of lading by which the parties agreed to the contract being governed by Japanese law and to their disputes being adjudicated upon by the District Court of Tokyo. The High Court dismissed the carrier's application for a stay on the grounds, inter alia, that the cargo owner resided in Malaysia, the vessel was registered here, it was cheaper to transport the Filipino crew members to Malaysia than to Japan and the cargo owner could have difficulty enforcing a judgment obtained in Japan. The vessel was registered in Malaysia and the ship owner was a company incorporated in Malaysia.

**[22]** On appeal in that case it was argued before the Court of Appeal by the appellant ship owner that the matters to be taken into account in determining whether to stay an action in a case where there is a forum selection clause was correctly set out in the Singapore Court of Appeal in *'The Vishva Apurva'; Owners of and Other Persons Interested in the Ship or Vessel 'Kalidas' v Owners of Cargo Lately Laden on Board the Ship or Vessel 'Vishva Apurva'* [1992] 2 SLR 175 in the judgment of Chan Sek Keong J (as His Lordship then was):

> In our view, FA Chua J failed to give sufficient weight to the exclusive jurisdiction clause. We should accord full recognition to exclusive jurisdiction clauses which are freely negotiated between the parties and which are unaffected by 'fraud, undue influence or overweening bargaining power' (see Warren Burger CJ in *Bremen v Zapata Off-Shore Co* (1972) 32 L Ed 2nd 513 at p 522), unless the plaintiff who seeks to break his contractual obligation can 'show at trial in the contractual forum will be [so] gravely difficult and inconvenient that he will, for all practical purposes, be deprived of his day in court. Absent that there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain' (at p 525)
> …

**[23]** Gopal Sri Ram JCA declined the invitation to adopt the Singapore and American approach:

> I regret that I must decline the invitation of counsel. There are compelling reasons for my refusal to apply the ratio in *Bremen v Zapata Off-Shore Co* which jurists in the United States call the 'Zapata test'. (See *Conflict of Laws by Scoles and Hay* (1984) Ed at p 353 et seq.) I will state my reasons. But before I do so, it is necessary for me to deal with what I perceive to be the principles that apply to this appeal.
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> The applicable law
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> The relevant law on the subject has, I believe, been settled by the decision of the Federal Court in *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Bhd* [1976] 2 MLJ 154 where Gill CJ (Malaya) said [at p 155]:
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> As regards the general principles in relation to jurisdiction where parties have agreed to submit exclusively to a foreign jurisdiction, in the case of *The Fehmarn* [1957] 2 All ER 707, Wilmer J said at p 710: 'Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this court that the agreement should be over-ridden and that the proceedings in this country should be allowed to continue. However, in the end it is, and must necessarily be, a matter for the discretion of the court having regard to all the circumstances of the particular case.'
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> In a later part of his judgment [1976] 2 MLJ 154 at p 155, the learned Chief Justice of Malaya reproduced the following passage from the judgment of Brandon J, as he then was, in *The Eleftheria* [1970] P 94 at p 99; [1969] 2 All ER 641 at p 645:

…

**[24]** The Court of Appeal then went on to set out the principles I have summarised above in the judgment of Brandon J. The learned Chief Justice of Malaya Gill CJ, then concluded his view in the following words:

> It would seem abundantly clear from the authorities that where a cause of action in respect of any dispute in relation to a contract arises and is therefore properly within its jurisdiction the court has a discretion whether or not to adjudicate upon the claim in the action even where the parties have agreed to refer such dispute to a foreign court, and that the question of jurisdiction is quite separate from the question of the proper law of the contract to be applied.

**[25]** In the *Inter Maritime*'s case, Gopal Sri Ram JCA (as he then was) went on to consider the development of the law in relation to this issue after *The Eleftheria* and concluded that no significant changes had been added to the law since this case. In short in this jurisdiction, the law and applicable principles as set out in *The Eleftheria* and adopted in *Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong* is good law.

APPLYING THE PRINCIPLES OF LAW ABOVE TO THE FACTS OF THIS CASE

**[26]** It therefore remains for me to apply the foregoing principles to the facts of the instant case. In essence where there is a forum selection clause that in itself does not oust the jurisdiction of the court. The jurisdiction of the court exists, subject to the court's power to stay the matter in order to give effect to the forum selection clause. It is a matter of discretion for the court to determine whether to allow the matter to be litigated locally or otherwise bearing in mind at all times that the parties had agreed to have the matter referred to a different forum. As stated above, and reiterated here the onus lies on the plaintiff to show a strong case that effect ought not be given to the forum selection clause.

**[27]** The salient background facts pertaining to this case have been set out above. In essence the plaintiff's grievance stems from the fact that the cargo under the three consignments were all discharged by the ship owner without procuring the surrender of the bills of lading as is normal shipping practice. This amounts to a breach of contract. The nub of the plaintiff's case therefore is whether, as a matter of fact, the cargoes were released without the surrender of the original bills of lading.

**[28]** I must start the exercise of determining how to exercise my discretion by giving full weight to the prima facie case for a stay of proceedings given the

subsistence of the forum selection clause. I will now go on to weigh on the one hand the factors tending to rebut that prima facie case, and on the other hand the factors tending to reinforce it.

**[29]** The factors tending to rebut the prima facie case in favour of a stay include the following matters:

(a) the contract between the parties for the carriage of goods was formed through D1 which is a Malaysian company as agent for D2 which is a company carrying on business outside the jurisdiction. D2 was however transporting goods from Malaysia to, inter alia, Banjul, Gambia. It is evident therefore that the contracts were formed in Malaysia;

(b) the plaintiff has suffered loss in Malaysia: Payment ought to have been received in Malaysia by the plaintiff from the receiver in Gambia prior to the release of the palm oil cargoes. Instead the ship owner released the cargoes to the receiver against letters of indemnity from the receiver rather than against the bills of lading; and

(c) the nub of the plaintiff's case, namely that the goods were released without the surrender of the bills of lading but against letters of indemnity issued by the receiver, is borne out by an admission in a series of email correspondence between D1 and the plaintiff. The writer of that email is Malaysian and resident in Malaysia.

**[30]** The defendants vide an email dated 14 February 2012 informed the plaintiff that the cargo carried under the three bills of lading were released to the receiver against the receiver's letter of indemnity without the knowledge or agreement of the plaintiff. It is evident from the letter of D1's employee, one Zairin Zin Mohamed, the line manager dated 15 February 2012 that the normal shipping practice of delivering against the original bills of lading was not followed. There is therefore a clear admission from an employee of the defendants residing in Malaysia that there was a breach or contravention of normal shipping practice. A crucial witness to these proceedings is resident in Malaysia.

**[31]** In summary therefore the witnesses to the formation of the contract, the role of the parties, the admission of wrongdoing and the quantum of the loss are all in Malaysia. It would therefore appear that the evidence on the issues of fact are largely situated or more readily available in Malaysia (or Gambia) rather than in France. I would therefore concur with learned counsel for the plaintiff that the bulk of the factual evidence is in Malaysia and not in France. I accept that it will cause the plaintiff substantial inconvenience and expense to take all these witnesses to France.

**[32]** The primary connection with France relates solely to D2 which is

owned by a French company. As such the relative convenience and expense of trial as between Malaysia and France weighs in favour of Malaysia in the present factual matrix and serves as a strong factor to rebut the prima facie case in favour of a stay.

**[33]** Other factors include:

(a) the fact that the plaintiff will be able to enforce any judgment obtained in this jurisdiction with ease against D1, the agent of D2, which is resident in Malaysia;

(b) it does not appear to this court that D2 genuinely desires a trial in France. The current application appears instead to be an attempt to procure a tactical or procedural advantage. I so conclude because the factual premise of this case is relatively straightforward. The goods were discharged in contravention of normal shipping practice, ie not against the original bills of lading, but against letters of indemnity from the receiver. There are no complex issues of fact to be dealt with. As such to insist on a trial in France, notwithstanding that the substantial factors pertaining to the matter are available in Malaysia through Malaysian witnesses appears to amount to a strong basis to rebut the prima facie case in favour of a stay; and

(c) the forum selection clause is France, not Gambia, the other jurisdiction where relevant facts or witnesses may be available or present. There appears to be no nexus between the current dispute and France save for the fact that D2 is a French company.

**[34]** As against these factors which serve to rebut the prima facie case in favour of a stay, I have considered that:

(a) the plaintiff would get a fair trial in France; and

(b) the plaintiff, if successful would be able to enforce any judgment against D2 in France.

**[35]** Having weighed the competing factors it appears to me that the factors I have outlined above in relation to the formation of the contract, the residence and availability of witnesses and evidence particularly in relation to the nub of the plaintiff's case, do indeed rebut the prima facie case in favour of the defendants under the forum selection clause. I conclude that the plaintiff has succeeded in establishing good cause why a stay should not be granted. Accordingly the defendants' application to set aside the writ and service of the same is set aside.

SETTING ASIDE OR STAY?

**[36]** A procedural issue arose in the course of these applications which I must

now allude to. The defendants' applications were premised on O 12 r 7 and did not expressly include in the alternative, a prayer for a stay. Given the nature of the application it appeared that the stance taken by the defendants was that this court had no jurisdiction to hear this claim. In the course of comprehensive oral submissions however, learned counsel for the defendant was clear that that was not the thrust of his submission. Indeed, as stated at the outset, learned counsel were in agreement on the law which they both submitted is as set out above.

**[37]** Learned counsel for the plaintiff submitted that in view of the basis of the application, namely under O 12 r 7, the applications ought to have been dismissed as the premise for such applications must be a lack of jurisdiction. Learned counsel for the defendant conceded that a stay is the proper relief to be sought in an application such as the present and that given the prayer for 'such other relief as this honourable court deems fit', this court could instead of setting aside the writ, simply grant a stay. In other words the terms of the orders prayed for were wide enough to encompass a prayer for a stay, (see *JH Rayner (Mincing Lane) Ltd & Ors v Manilal & Sons (M) Sdn Bhd & Anor* [1987] 1 MLJ 312; *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156 and the dissenting judgment of Mohd Ghazali in *Taipan Focus Sdn Bhd v Tunku Mudzaffar b Tunku Mustapha* [2011] 1 MLJ 441).

**[38]** I accept the latter proposition, namely that the prayer for 'other relief is wide enough to encompass a stay in the instant case. However this point is moot in view of my reasoning above.

THE STRIKING OUT APPLICATIONS UNDER O 18 R 19

**[39]** The second limb of the defendants' application was premised on a striking out. In essence the defendants' contention was that the plaintiffs had erred fatally in bringing an action against both D1 and D2 who are agent and principal respectively. In essence their contention was that the plaintiff was bound to elect either one or the other and by failing to do so, had erred fatally. In support of this contention they relied on *Wong Peng Yan Benjamin v Genting Bhd & Anor* [1993] 3 MLJ 713; [1994] 1 CLJ 35. A perusal of that case discloses in fact that the correct position in law is that where an agent, having made a contract in such terms that he is personally liable, (as is the case here) has been sued on it to judgment, then no action is maintainable against the principal on the same contract. In other words where the agent has been sued to judgment under a contract where he is personally liable, an action cannot then be commenced against the principal in respect of the same contract. This is because judgment has already been obtained on the contract in respect of a party who represents the principal. It would amount to res judicata.

**[40]** The situation is entirely distinguishable where the party seeking to sue the agent and principal has not as yet obtained judgment against either. The issue of election against either the agent or principal can be dealt with during or at the close of trial. At the inception of the case however, the plaintiff is not in a position to determine conclusively whether to proceed against one or the other as all relevant facts may not be within his knowledge and will unfold during the course of trial. Therefore the plaintiff is entitled to commence an action against both the agent and principal, and make the requisite election, if necessary during or at the close of trial.

**[41]** In any event s 186 of the Contracts Act 1950 actually envisages situations where both the agent and principal may be severally or jointly liable. It provides as follows:

> In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

**[42]** Given the foregoing it would be untenable to contend that the plaintiff's claim ought to be struck out for being abusive or scandalous simply because the plaintiff has sued both the agent and the principal. As such the applications to strike out are also dismissed.

*Defendants' applications dismissed.*

Reported by Ashok Kumar